

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

December 6, 1994

DOCKET FILE COPY ORIGINAL

Jonathan D. Blake, Esq.
Kurt A. Wimmer, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

Re: Gen Docket No. 90-314
PP-6
PP-52
PP-58

Dear Mr. Blake and Mr. Wimmer:

Thank you for your letter of behalf of American Personal Communications (APC) calling to my attention possible violations of the Commission's ex parte rules by Pacific Telesis (Pactel) in connection with the award of pioneer's preferences in the 2 GHz broadband personal communications service (PCS). Letter from Jonathan D. Blake and Kurt A. Wimmer to Andrew S. Fishel and William E. Kennard (Oct. 17, 1994).¹ In consultation with the General Counsel, I have reviewed your allegations, Pactel's responses, and the public record. For the reasons which follow, I see no reason to refer this matter to the Commission for further action.

Your allegations relate to a speech made by Pactel's chief executive officer, Philip J. Quigley, at the annual convention of the United States Telephone Association (USTA) on October 10, 1994. You assert that all five members of the Commission, the chief and deputy chief of the Common Carrier Bureau, and advisors to the Chairman and the Commissioners were in attendance. According to press reports, Mr. Quigley's speech concerned the Commission's award of pioneer's preferences to APC, Cox

¹ See also Letter from Alan F. Ciamporcerro to Andrew S. Fishel and William E. Kennard (Oct. 21, 1994); Letter from Jonathan D. Blake and Kurt A. Wimmer to Andrew S. Fishel and William E. Kennard (Oct. 24, 1994); Letter from Alan F. Ciamporcerro to Andrew S. Fishel and William E. Kennard (Oct. 27, 1994); Letter from Jonathan D. Blake and Kurt A. Wimmer to Andrew S. Fishel and William E. Kennard (Nov. 2, 1994).

No. of Copies rec'd
List ABCDE

3 Copies

Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) for broadband PCS authorizations. See "Quigley Again Raises Objections Over Pioneer's Preference 'Fiasco,'" Washington Telecom Week, Oct. 14, 1994 at 9-10. Decisions to award pioneer's preferences (where, as here, they have been formally opposed) are considered restricted adjudicative matters as to which ex parte presentations are prohibited. Report and Order (90-217), 6 FCC Rcd 3488, 3493 ¶ 42 (1991).

By way of background, on February 3, 1994, the Commission made final awards of pioneer's preferences to APC, Cox, and Omnipoint in recognition of their technological innovations relating to broadband PCS. Third Report and Order (90-314), 9 FCC Rcd 1337, 1339 ¶ 7 (1994), pets. for recon. pending. APC received a preference for Channel Block A in the Washington-Baltimore Major Trading Area (MTA); Cox received a preference for Channel Block A in the Los Angeles-San Diego MTA; and Omnipoint received a preference for Channel Block A in the New York MTA. Id. at 1349 ¶ 80. Channel Block A is a 30 MHz block, the largest permitted. Pursuant to the then existing pioneer's preference, APC, Cox, and Omnipoint were not required to make any payment for their authorizations. First Report and Order (93-266), 9 FCC Rcd 605, 610-11 ¶ 9 (1994).

Several parties sought judicial review of the pioneer's preference awards and the decision not to alter the rules to require payment for broadband PCS preference recipients. They argued, among other things, that it was anomalous for the pioneers to receive licenses free of charge while other applicants for broadband PCS could receive licenses only pursuant to competitive bidding (which Congress had authorized while the tentative awards to APC, Cox, and Omnipoint were under consideration).

After a voluntary remand, the Commission, on August 9, 1994, amended the pioneer's preference rules to provide that broadband PCS pioneers would be required to pay 90 percent of the value of their authorizations as determined by a specified formula. Memorandum Opinion and Order on Remand (93-266, 90-314), 9 FCC Rcd 4055 (1994), appeal docketed sub nom. American Personal Communications v. FCC, No. 94-1549 (D.C. Cir. Aug. 10, 1994). Subsequently, legislation was introduced in Congress which would: (1) ratify and make nonreviewable the grants to APC, Cox, and Omnipoint, and (2) require them to pay 85 percent of the value of their authorizations pursuant to a specified formula. H.R. 5110, 103d Cong., 2d Sess. § 801 (1994) (the GATT legislation).²

² The principal focus of H.R. 5110 is the ratification of the Uruguay round of the General Agreement on Trade and Tariffs (GATT).

In his speech Mr. Quigley reportedly made the following remarks concerning these events:

A PCS license could have quite a bit of value
So the government wants to auction them off. I have no big problem with that. It will raise our costs, but if everybody's in the same boat, it's a wash. If we can help advance a public goal without messing up the competitive dynamic, fine.

Then the FCC said: "We may give away some licenses to companies that have done distinguished technical r&d [research and development] in the field of PCS" But as things turned out, they gave away one of the best licenses in the lot -- a 30 MHz license. That means only one 30 MHz MTA [major trading area] remains, and that creates a scarcity factor in the bidding process[. . . .] This pioneer preference thing then starts to really mess with the competitive balance.

Mr. Quigley reportedly questioned the legitimacy of the award of pioneer's preferences to APC, Cox, and Omnipoint, saying:

[Omnipoint was] the only legitimate pioneer among the three. . . . [Even so] there's no way [the three companies'] technical contributions merit a billion-dollar discount [for PCS licenses].

When all this was pointed out, fair-minded people agreed. . . . The FCC rescinded the whole scheme and demanded that the former winners pay 90% of market value -- still a sizable and unearned break, but better than free.

Now the really depressing part Here's what happened: A couple of weeks ago, the formula by which their [license] fee would be calculated was changed. It had been proposed by the FCC and publicly debated, but now it was changed substantially and appended to the GATT trade agreement. As you probably know, members of Congress can only vote up or down on trade treaties. There are no amendments. . . . This has competitively harmed PCS bidders in three large markets.

Washington Telecom Week, October 14, 1994 at 9-10.

You allege that Mr. Quigley's remarks violated 47 C.F.R. § 1.1208, which generally prohibits ex parte presentations in restricted proceedings. You assert that Mr. Quigley's remarks were presentations concerning a restricted proceeding, i.e., they were communications directed to the merits or outcome of the

proceeding to award PCS pioneer's preferences, which is currently pending. You specifically note that he said: (1) that Omnipoint was the only legitimate pioneer, (2) that APC, Cox, and Omnipoint did not "merit" a discount for their licenses, and (3) that this discount was "unearned."

You further assert that Mr. Quigley's comments were effectively made on an ex parte basis to Commission decision-making personnel. You contend that Pactel crafted Mr. Quigley's speech to address the merits of the pioneer's preference proceeding to the Commissioners and other Commission staff, who they knew would be in the audience. You characterize this as a flagrant and blatant violation of the rules. You ask the Commission to investigate to determine whether other Pactel personnel made ex parte presentations at the USTA convention.

Pactel responds that there was nothing improper about Mr. Quigley's speech. Pactel maintains that the speech was directed not to the pioneer's preference proceeding but to the GATT legislation, which necessarily involves overlapping subject matter. Pactel contends that to the extent Mr. Quigley mentioned the specific awards to APC, Cox, and Omnipoint, he did so in a speech before 1500 people and not in a clandestine communication to the Commission. Pactel argues that considering such a public address improper would violate its First Amendment rights. According to Pactel, APC has itself made statements concerning the pioneer's preference awards in media read by Commission personnel. Additionally, Pactel asserts that there is no reason to believe that other Pactel personnel made ex parte presentations at the USTA convention.

You reply that even if Mr. Quigley's speech was addressed to the GATT legislation, some of it dealt with the pioneer's preference awards, a subject which Mr. Quigley did not necessarily have to raise. You also argue that the ex parte rules do not apply only to clandestine contacts. Rather, you assert that speeches at public gatherings could be abused to subject a captive audience of Commission decision-makers to presentations to which opposing parties would have no opportunity to respond. You claim that if Mr. Quigley's speech is considered protected under the First Amendment, private ex parte presentations would also be permissible. Additionally, you assert that APC's statements in the media are distinguishable from Mr. Quigley's speech because the statements were not directed to the Commission.

Having reviewed the facts presented, in consultation with the General Counsel, it appears that Mr. Quigley's speech does not constitute a violation of the ex parte rules. His remarks address mainly the GATT legislation, in particular, and, more generally, the policy issue (addressed by the Commission in a rulemaking proceeding) of whether and how much the broadband PCS

pioneers should be required to pay for their authorizations. The only comment clearly directed to the merits of the pioneer's preference awards -- that Omnipoint was the only legitimate pioneer -- was made in passing by way of background.

In this context, while Mr. Quigley clearly intended publicly to vent his displeasure at the Commission's actions (and those of Congress), it seems unreasonable to view such a remark in a speech before 1500 people as directed to the Commission personnel who happened to be in the audience. Thus, it does not appear that his comment should be considered to have been "made to decision-making personnel" as the definition of "ex parte presentation" requires. 47 C.F.R. § 1.1202(b).

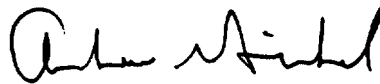
Moreover, even if Mr. Quigley's single comment addressed to the merits of the preference awards could technically be considered a violation of the ex parte rules, it would be hard to argue that such a brief and conclusory comment made in an open forum was likely to materially prejudice the proceeding. I see no possibility that Mr. Quigley's speech in any way threatens to compromise the fairness of this proceeding. See generally Louisiana Association of Independent Producers v. FERC, 958 F.2d 1101, 1112-13 (D.C. Cir. 1992). In view of this analysis, it is unnecessary to consider whether your request for sanctions against Pactel implicates the First Amendment. Cf. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075-76 (1991) (a state rule regulating the extrajudicial speech of attorneys regarding pending cases was constitutional only because it was narrowly tailored to speech uttered with knowledge that it was likely to have material prejudice).³

³ Gentile notes the distinction between utterances made in public and those made directly before the decision-maker: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." 501 U.S. at 1071. By implication, the Commission has greater power to regulate speech in its own precincts than in a public forum.

-6-

For these reasons, I see no basis to recommend that the Commission take further action. As to the possibility that Pactel personnel made ex parte presentations apart from Mr. Quigley's speech, you have provided no evidence to support this allegation.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Andrew S. Fishel". The signature is fluid and cursive, with the first name "Andrew" and last name "Fishel" clearly distinguishable.

Andrew S. Fishel
Managing Director

cc: Alan F. Ciamporzero, Esq.